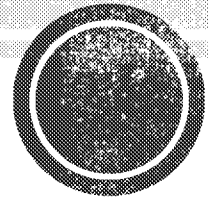




OREGON, EPA AND CORPS MEETING ON CWA §404 ASSUMPTION



September 30, 2019

1:00 pm– 3:00 pm Pacific Time



AGENDA

Welcome

- Chris Hladick, Regional Administrator, EPA Region 10
- Col. Aaron Dorf, District Engineer, U.S. Army Corps of Engineers, Portland District
- Vicki Walker, Director, Oregon Department of State Lands
- Whitman, Director, Oregon Department of Environmental Quality
- Representative Susan McLain, Oregon State Legislature

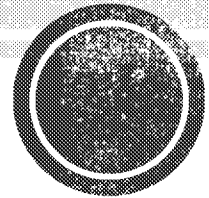
Introductions

- All
- CWA § 404 Assumption: What and How.
- State CWA § 404 program and EPA oversight.
- Discussion and Questions.



CWA §404 ASSUMPTION: WHAT AND HOW

Kathy Hurlb





CWA §404 ASSUMPTION: WHAT & HOW

- CWA §404 and Assumption Authority
- States Views on Benefits and Challenges to Assumption*
- EPA's role
- CWA §404 vs §402
- Requirements for CWA §404 Assumption
 - Assumption package
 - The Assumption approval process

*2007 EPA survey <http://www.aswm.org/pdf/lib/hurld.pdf>, and updated with EPA efforts.



CWA §404 ASSUMPTION AUTHORITY

- CWA §404
 - A permit is required before dredged or fill material may be discharged into waters of the United States.
- CWA §404(g)
 - States and tribes may assume, or take over, the permitting responsibility and administration of the CWA §404 permit and enforcement program for certain waters.
- CWA §404(h) and 40 CFR part 233 lists:
 - State requirements to assume and administer program
 - EPA responsibilities: approval and oversight
 - Requirements for review and modification of state program
- Program approval
 - The EPA Regional Administrator (RA) approves state program with HQ concurrence.



STATE VIEWS ON BENEFITS*

- State program can have broader jurisdiction and authorities
 - Scope of waters
 - Activities regulated
 - Incorporation of other authorities
- State is generally more familiar with
 - the resource
 - local concerns, issues and needs
- State has better information on the resources
 - monitoring, data collection
- Share responsibility with federal government
 - adding staff and resources
- State can streamline permitting
 - e.g., with other permit processes

*2007 EPA survey http://www.aswm.org/pdf_lib/hurld.pdf



STATE VIEWS ON CHALLENGES*

- **Scope of assumed waters**
 - Definition of navigable waters – Federal Advisory Committee – 2015-2017
 - Jurisdiction
- **Costs – funding and staffing**
 - EPA cooperative agreement
- **Inconsistencies between federal and state definitions and program elements**
 - EPA undertaking rulemaking to provide clarity.
- **Concern from environmental groups, Corps, USFWS & NMFS**
 - ESA consultation – 2010 letter to ECOS and ASWM; EPA grant
 - State funding and capacity to implement program

*2007 EPA survey http://www.aswm.org/pdf_lib/hurld.pdf; blue text is an action EPA has undertaken to address challenges



EPA'S ROLE IN CWA §404 ASSUMPTION

- **Prior to assumption**
 - Work to enhance state capacity
 - Wetland Program Development Grants
 - Provide technical advice

- **Evaluate and approve/disapprove state assumption request**

- **Oversight of assumed program**
 - Coordinate federal oversight of permits
 - Review modifications of state program
 - Withdraw program approval, if needed



CWA §404 VS §402

■ Scope:

- Currently No partial program approval or phasing in CWA § 404 assumption
- Corps still retains CWA §404 permitting for some waters of the U.S.

■ Approval:

- MOA with EPA and MOA with Corps
- Corps, USFWS and NMFS comment on request

■ Oversight:

- Includes coordinating Corps, USFWS and NMFS input
- If EPA maintains an objection to a permit, permit processing and decision transferred to Corps



REQUIREMENTS FOR ASSUMPTION

- A state program must be:
 - consistent with and
 - no less stringent than the Act and implementing regulations

- The approved state program must have:
 - Equivalent scope of jurisdiction (WOTUS)
 - Activities regulated are those subject to CWA § 404
 - Public participation
 - Consistency with the §404(b)(1) Guidelines
 - Adequate enforcement authority



REQUIREMENTS FOR ASSUMPTION: **ASSUMPTION PACKAGE**

- Includes:
 - Letter from Governor
 - Complete program description
 - Attorney General's statement
 - MOA with EPA Regional Administrator
 - MOA with Secretary of USACE
 - All applicable state statutes and regulations administering the program



REQUIREMENTS FOR ASSUMPTION: **PROGRAM DESCRIPTION**

- Scope and structure of program
 - Jurisdiction
 - Activities regulated
 - Anticipated coordination
 - Permit review criteria
 - Scope of permit exemptions
- Procedures for permitting, administrative and judicial review
- Structure and organization of state agencies administering the program
- Funding and staffing levels



REQUIREMENTS FOR ASSUMPTION: **PROGRAM DESCRIPTION CONT.**

- Anticipated workload
- Copies of permit application forms, permit forms and reporting forms
- Compliance evaluation and enforcement programs
- Clarification of waters under the state's and those under the Corps' jurisdiction
- BMPs proposed to satisfy exemption provisions



REQUIREMENTS FOR ASSUMPTION: **ATTORNEY GENERAL'S STATEMENT**

- Citations of statutes, administrative regulations and judicial reviews demonstrating adequate authority
- Legal analysis of the effect of state laws regarding private property takings
- Certification of the authority of each state agency to administer the program
- If applicable, an analysis of authority over Tribal lands e.g., lands owned by the Oregon Tribes
 - Not seeking such authority does not constitute partial assumption



REQUIREMENTS FOR MOA WITH EPA

- Classes and categories of permits for which EPA waives federal review
- Provisions for state reporting on program implementation
- EPA and state roles/coordination regarding:
 - Compliance monitoring
 - Enforcement
- Provisions for modification of the MOA
 - Including transfer or withdrawal



REQUIREMENTS FOR MOA WITH CORPS

- Description of waters of the U.S. over which Corps retains permitting responsibility:
 - Tidal waters and their adjacent wetlands
 - Waters presently (or with reasonable improvements) used to transport interstate or foreign commerce and their adjacent wetlands
- Procedures for transfer of pending permit applications to the state
- Identification of Corps general permits to be assumed by the state
 - Including a transfer plan



ASSUMPTION APPROVAL PROCESS

- Assumption Package submitted to EPA
 - EPA has 120 days to approve or disapprove the state request*
 - 30 day EPA review for package completeness
 - Complete; state notified
 - Incomplete; package returned to state
- Review period includes:
 - State notification package is complete
 - Corps, USFWS and NMFS review
 - Comments due to EPA within 90 days
 - Notice of assumption request published in Federal Register and newspapers
 - 45 day comment period
 - Public hearing 30+ days after Federal Register notice published
 - Tribal consultation if appropriate

* State and EPA can agree to an extension of the 120 day statutory timeframe for program review and approval.



ASSUMPTION APPROVAL PROCESS CONT.

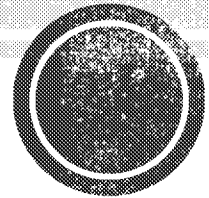
- Regional review
 - Tribal Consultation (EO 13175)
 - Response to comments in final FR notice
 - Direct response to Corps, USFWS and NMFS

- RA approves/disapproves request <120 days
 - Time limit may be extended by EPA and the state
 - If approved: RA notifies the State and publishes notice in the Federal Register
 - If not approved: RA notifies the state and lists revisions needed to obtain approval



STATE ASSUMED CWA §404 PROGRAM AND EPA OVERSIGHT

Yvonne Vallette





STATE 404 PERMIT PROCESS

- State transmits notice of every permit application received to EPA
 - EPA reviews permits per the MOA
- State shall not issue a CWA §404 permit to which EPA has objected or placed permit conditions
 - Until all of EPA's concerns are addressed
- All permits must be consistent with the environmental review criteria (ie. 404(b)(1) guidelines)
- State shall maintain a compliance and enforcement program



EPA OVERSIGHT

- **Review of permits not waived in MOA**
 - Corps, USFWS and NMFS provided public notice
 - EPA has final decision to comment, object or require conditions on a state/tribal permit
 - <30 days notifies of EPA's intent to comment
 - < 90 days EPA provides comments

- **Program Review and Evaluation**
 - Ensure program consistency
 - e.g., Mitigation regulations, Rapanos guidance
 - Review annual reports
 - Made available for public review

- **Enforcement**



EPA OVERSIGHT: PERMIT REVIEW

- MOA with EPA identifies categories of projects for which EPA review is waived.
 - EPA can not waive review of:
 - Draft general permits
 - Discharges that may impact endangered species
 - Discharges that may adversely impact waters of another state
 - Discharges with known or suspected toxic or hazardous pollutants
 - Discharges proximal to public water supply intakes
 - Discharges within critical State/Federal areas



EPA OVERSIGHT: PERMIT REVIEW CONT.

- EPA may require review of additional categories or all permits e.g.,
 - In NJ EPA reviews permits filling of >5 acres of freshwater wetlands
 - In MI EPA reviews permits for discharges into critical areas
- EPA's review, and any objection, shall be based on:
 - The CWA
 - CWA 404 implementing regulations
 - 404(b)(1) Guidelines



EPA OVERSIGHT: PERMIT REVIEW CONT.

- If EPA objects to a permit, or requires permit conditions, the state shall either:
 - Request a public hearing*;
 - Issue a revised permit satisfying EPA's objection or permit conditions < 90 days; or
 - Notify EPA of intent to deny the permit < 30 days.

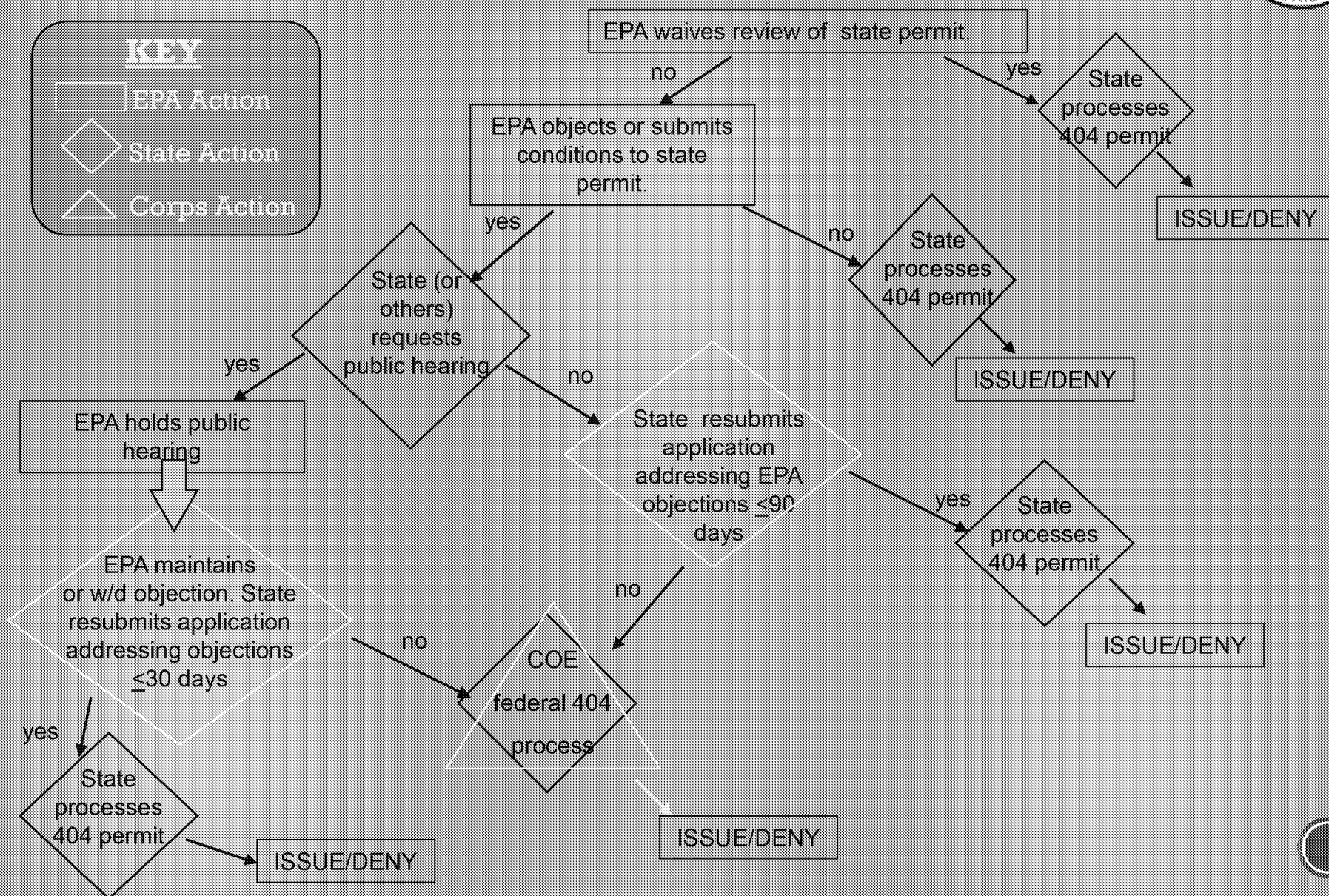
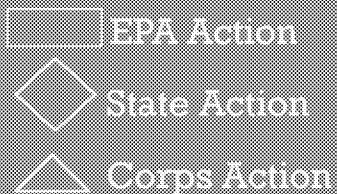
- If the state neither satisfies EPA's concerns nor denies the permit, the Corps shall process the application.

- * EPA shall conduct a public hearing when requested by the state or if warranted by significant public interest.

EPA Review of State Permit Flow Chart



KEY





EPA OVERSIGHT: ANNUAL REPORTS

- Program reporting
 - State submits draft annual reports:
 - EPA evaluates state's administration of program
 - Identifies problems
 - Recommends resolutions
 - Draft annual report made available for public review by EPA
 - EPA publishes notice of availability of final report



EPA OVERSIGHT: ENFORCEMENT

- State is the lead for enforcement and compliance
 - EPA takes collaborative approach

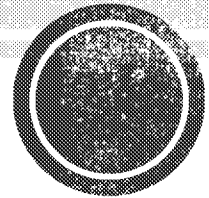
- CWA §309 authorizes EPA to take separate actions for penalties
 - State penalties must be comparable to what EPA would have sought

- CWA §404(n) states that nothing in §404 (including assumption) limits EPA's authority to take action pursuant to CWA §319
 - Includes orders, administrative actions, civil actions and criminal actions



CWA §404 RULEMAKING UPDATE

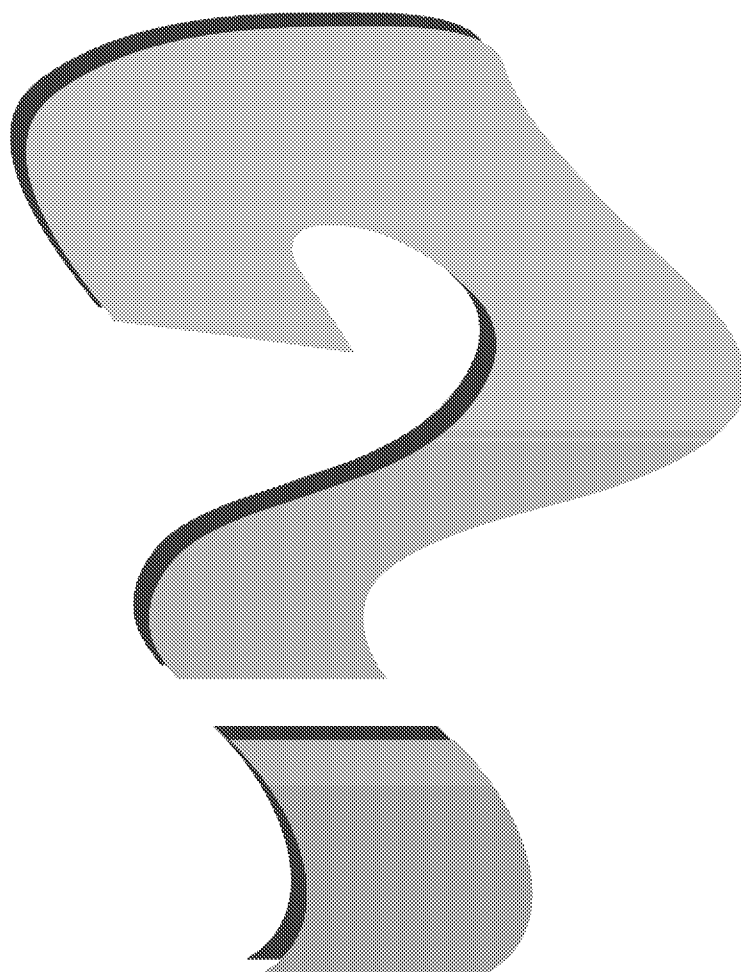
EPA HQ





CWA §404 ASSUMPTION REGULATION

- CWA § 404(g): Recent Activities
 - In 2018, the EPA conducted tribal consultation and held pre-proposal input meetings and webinars with tribes and states.
 - States and tribes provided written pre-proposal input in early 2019 for the EPA's consideration.
- Status and schedule for the 404(g) rulemaking:
 - The EPA is currently developing options for the rulemaking.
 - The EPA plans to issue a proposed rule in spring of 2020, and a final rule in 2021.





NEXT STEPS



EPA POINTS OF CONTACT

- EPA R10
 - Program: Yvonne Vallette Vallette.Yvonne@epa.gov
 - Counsel: John (Matt) Moore Moore.JohnM@epa.gov

- EPA HQ
 - Program: Delores Wesson Wesson.Delores@epa.gov and Lauren Kasparak kasparak.lauren@epa.gov
 - Counsel: Lauren Maher Maher.Lauren@epa.gov